SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-504

THE NEWS-JOURNAL COMPANY, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The News-Journal Company petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on August 19, 1971.

OPINIONS BELOW

The opinion of the Court of Appeals (App., infra, p. 1a) is not yet reported. The Decision and Direction of Election is reported at 180 N.L.R.B. No. 137. The Decision and Order of the National Labor Relations Board is reported at 185 N.L.R.B. No. 40.

JURISDICTION

The judgment of the Court of Appeals (App., *infra*, p. 7a) was entered on August 19, 1971. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the result reached by the United States Court of Appeals for the Third Circuit in the present case is in conflict with the decisions of the Court of Appeals for the Fourth Circuit in *N.L.R.B.* v. *A. S. Abell Co.*, 327 F.2d 1 (4th Cir. 1964); the Court of Appeals for the Seventh Circuit in *Frito-Lay, Inc.* v. *N.L.R.B.*, 385 F.2d 180 (7th Cir. 1967) and the Court of Appeals for the Ninth Circuit in *Carnation Co.* v. *N.L.R.B.*, 429 F.2d 1130 (9th Cir. 1970).

2. Whether measurement of the amount of job skill and the potential for additional profit are proper factors to be considered in determining employment status under Section 2(3) of the Labor Management Relations Act, 29 US.C. § 152(3).

3. Whether action of petitioner in changing spots at which truckers are to deliver newspapers and in informing truckers that newspapers should be delivered in good condition defeats independent contractor status of truckers under Section 2(3) of the Labor Management Relations Act, 29 U.S.C. § 152(3).

4. Whether the National Labor Relations Board and the Court below erred in holding that the preponderance of the evidence herein showed that the contract haulers who deliver petitioner's newspapers are employees rather than independent contractors under Section 2(3) of the Labor Management Relations Act, 29 U.S.C. § 152(3).

STATUTE INVOLVED

Section 2(3) of the Labor Management Relations Act, as amended, 29 U.S.C. § 152(3) (1965) provides:

> "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined."

STATEMENT

A. Background Facts

This case centers on the status under the Labor Management Relations Act of twenty-one individuals who, under the terms of a contract, transport the Petitioner's two daily newspapers from the publishing plant at Wilmington, Delaware, to various drop spots where the newspaper is further distributed to the reading public by either newsboys or motor route carriers.

The petitioner is a Delaware corporation engaged in the business of publishing and distributing two newspapers, The Morning News, and The Evening Journal,

in and around the Wilmington, Delaware area. Since World War II, the newspaper's distribution process has undergone several metamorphoses. Shortly after the War, the News-Journal utilized five persons designated as District Managers to circulate its newspapers in and around Wilmington. These District Managers purchased their newspapers from the Company, distributed and sold them, and made their own collections. That distribution process accounted for approximately one-half the circulation, the remainder being distributed by contract haulers serving the suburban and country areas around Wilmington. (JA 28).[1]

Sometime around 1946, the News-Journal eliminated the District Manager method of distribution in favor of independent trucking companies, such as Highway Express Lines. Those companies hired their own drivers and utilized their own equipment in distributing the newspapers. The District Managers became employees of the company as sales and collection men, functions which they perform today. (JA 28, 29).

In the early 1960's, the News-Journal began to phase out the trucking companies, replacing those companies with individuals who are independent contractors. At about the same time, the News-Journal automated its mailroom facilities and a number of these mailers were released from employment with severance pay. The Company offered and a number of laid-off mailers accepted written independent hauling contracts. The remaining contractors needed to implement this new system were obtained through other bids. (T. 26,

[1] References to the joint appendix, printed for use in the Court below and filed with this Petition, are shown as "JA". References to the transcript of the hearing before the Board hearing examiner are shown as "T".

29-31, JA 4). These independent contract haulers performed and still perform the identical delivery function of the predecessor trucking companies. (JA 4).

The relationship between the News-Journal and each contract hauler is basically governed by a written contract.[2] As a practical matter, the routes, the points at which bundled newspapers are delivered, and the remuneration have been the subject of oral adjustments made for the convenience and with the agreement of both parties. (JA 30, 36-37). Throughout their relationship, both the Company and the contract haulers regarded the relationship as one of independent contractor status. (T. 447, 487).

The written contract provides in the case of each contractor that the contractor shall deliver, or cause to be delivered, pre-bundled newspapers of the News-Journal to various destinations as may be from time to time established by the Company. Such deliveries are to be made as soon as reasonably possible after receiving the newspapers from the Company. (JA 103, Exhibit E. 5). In return for this service, the contractor received a weekly fixed payment. Under the written contract, it is the responsibility of the contractor to purchase and maintain his own truck(s). The contractor absorbs his operating expenses, with-

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[2] Exhibit E. 5. (JA 103) At the representation hearing, three out of the twenty-one written contracts were not located by the News-Journal. These three were either misplaced or had not been prepared. However, the three involved haulers operated under agreements with the News-Journal, the terms of which were similar, if not identical, to the terms contained in the other eighteen written contracts. One of these three haulers, William Wilson, serviced honor vending boxes owned by the Company. (JA 4)

out the right to reimbursement from the News-Journal. Also, the right to hire additional help or substitutes is within the discretion of the contractor.

The contractor, under the terms of the written contract, is free to engage in any other business, including the delivery of other newspapers or magazines, provided that such activity does not interfere with the reasonably prompt delivery of the News-Journal's newspapers. (T. 95, 455). In fact, a majority of the haulers at one time or another have operated sales or distribution routes for other products, ranging from trash collections to milk and pastry delivery sales. The method of completing delivery of the newspapers is within the control of the contractor. (JA 90, 103). Sequence of delivery at drop spots is a matter of individual contractor preference, except in isolated instances where connections must be made with feeder routes. (JA 46-47, 49-50, 90).

Although the written contract provides that it may not be modified or amended unless in writing, the parties agreed to amend the terms of the written contract involving remuneration and route designation. (JA 30, 36-37). The Company does not directly supervise the hauler and contact between the two is minimal. (T. 72, 75-76, 139, JA 49-50). If the contract hauler does not perform according to contract terms, such complaints from newspaper carriers or dealers are routed to the Company's circulation department from the District Manager, whereupon, if necessary, they are discussed with the hauler by the Circulation Director or his assistant. (JA 34, 44, 94-95). Similarly, drop spot changes due to shifting carrier or dealer requirements are transmitted in writing to the hauler at the time of pick-up (JA 41-42).

The haulers are not required to display News-Journal advertising on their trucks. If they do desire to place such advertisements on their equipment, a separate agreement for compensation is entered into by the parties. Additionally, except for occasional delivery of stakes and tubes,[3] special tasks, such as delivery of mailbags of newspapers to post offices, are specially compensated in accordance with the parties' agreement. (JA 38, 84, T. 225-26, 360, 366).

The net compensation received by the contractor depends on profits. The gross payment made by the Company to the hauler is based on the hauler's bid price, as subsequently modified by oral agreement, or on an agreed weekly sum taking into consideration the involved distance, the number of runs, stops, and newspapers. Costs of doing business, such as repairs, maintenance, licensing,[4] and insurance, as well as the initial cost of obtaining vehicles, are not subject to Company reimbursement. (JA 103). The Company keeps no personnel records on these haulers, its records being limited to only accounting, contract copies, and route descriptions. (JA 55).

B. The Representation Hearing

This litigation was initially precipitated by a union letter to the News-Journal dated February 4, 1969, which stated that the union sought representation of

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[3] Stakes and tubes are receptacles, similar to mailboxes, used in rural or suburban areas for protection and easy delivery of newspapers.

[4] A single exception is an annual fee amounting to $22.00 for newspaper distribution in the town of Elsmere, where four trucks operate, which is billed to and paid by the Company. The Wilmington head tax on employees is not imposed on the Company for these contract haulers. (JA 76).

the twenty-one contract haulers who deliver the newspapers published by the News-Journal. (T. 8-9). In response to that letter, the News-Journal asserted that the haulers were independent contractors and, accordingly, there was no appropriate unit for the union to represent. Shortly thereafter, the union filed a petition for certification with the Regional Director for the Fourth Region and hearings thereon were held in Philadelphia, Pennsylvania, on May 5, 6, 22, and 23, 1969. Pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations and by direction of the Regional Director, the case was referred to the Board, which delegated its powers in connection with this case to a three-member panel. That panel, on January 21, 1970, issued its decision and direction of election, holding that the involved contract haulers were covered employees under the Act, rather than independent contractors, and that they constituted an appropriate unit. That decision and direction of election is set out at 180 N.L.R.B. No. 137, and App. p. 7a.

In this Decision and Direction of Election, the Board concluded that the truckers were employees because: (1) the services rendered consist almost exclusively of routine manual work; (2) the possibility of realizing meaningful added profit *appears* to be "very limited"; (3) the deliverers cannot decide when or whether they will go out on an assignment route; (4) they cannot fix the time of delivery of the newspaper; and (5) the territories and drop spots are pre-determined by the Petitioner. Completely ignoring the evidence indicating the truckers' true independent status, the Board relied on the character of their work and on the low-profit potential, both of which are immaterial to a section 2(3) determination. More-

over, the other factors relied upon by the Board focus primarily on the end result of the contract and not on the manner and means through which the contract is accomplished.

C. The Unfair Labor Practice Proceeding

Thereupon, on February 17, 1970, and in accordance with the January 21, 1970 direction of election, a supervised, secret-ballot election was conducted among the individuals comprising that unit, resulting in a designation and selection of the union as the collective-bargaining representative. The union was certified by the Board on February 26, 1970. Afterward and when approached by the union to collectively bargain, the News-Journal refused, still maintaining that the newspaper deliverers were independent contractors and that the unit sought to be represented by the union was inappropriate. On April 10, 1970, as a result of this refusal to bargain, the union instituted an unfair labor charge alleging that the News-Journal violated Section 8(a)(1) and (5) of the Act.

After the unfair labor charge reached issue, the counsel for the General Counsel of the Board moved for summary judgment on the pleadings and the News-Journal filed a cross-motion for summary judgment. In his motion, the Board's General Counsel argued that the issue raised by the pleadings, *i.e.*, the status of the newspaper deliverers, was foreclosed from determination in that proceeding, having already been decided at the representation stage. Seeking to vindicate its position that the deliverers were not employees within the meaning of the Act, the News-Journal's cross-motion for summary judgment again urged that the Board erred at the representation stage; and that

subsequent to the Board's Decision and Direction of Election, the Ninth Circuit in an analogous case [5] ruled that contested distributors therein were independent contractors, rather than employees as the Board had held. By so ruling, the News-Journal's motion continued, the Ninth Circuit dismissed the Board's reliance on economic controls and incentive, points heavily relied upon by the Board in the instant proceeding.

Nevertheless, the Board held that by the News-Journal's refusal to bargain with the union, it was engaging in an unfair labor practice within the meaning of Section 8(a)(1) and (5) of the Act. As a result, the Board, on August 27, 1970, ordered the News-Journal to cease and desist from so refusing and to take the following affirmative action: (1) bargain with the union and embody any understanding resulting therefrom in a written agreement; (2) post copies of the notice appended to the Board's August 27, 1970 order at its place of business; and (3) notify the Regional Director for Region 4 by September 7, 1970, what steps the News-Journal had taken to effect compliance therewith.

It is from this August 27, 1970 order that the News-Jurnal, on September 8, 1970, filed its petition in the Third Circuit for review.

D. The Decision of the Court Below

The Court below recognized that the record contained evidence showing, on the one hand, that the deliverers were independent contractors; and on the other hand, that the delivery men "enjoyed a somewhat different

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[5] *Carnation Co.* v. *N.L.R.B.*, 429 F.2d 1130 (9th Cir. 1970).

status." (App. p. 4a) Apparently, the "different status" enjoyed by the drivers centered on what the Court found to be "frequent" meetings between District Managers and truck drivers (App. p. 3a). Reliance on such meetings was completely misplaced, however. First, there is no evidence supporting a finding that these meetings were "frequent". Second, such meetings focused on the end result of the contract, *i.e.*, proper delivery of the newspapers (JA. 44). If newspaper bundles were delivered in a damaged condition or to the wrong drop spot, the District Manager or other company officials would, as they had a right to under the contract, bring such errors to the attention of the concerned driver. But such contact between the parties resulted only from a concern that the contract be performed as agreed. It does not defeat the drivers' status as independent contractors.

It held to be "critical" the fact that changes in the delivery schedule were made at the insistence of the Petitioner and that the Petitioner was the "sole judge" whether such changes merited corresponding adjustment in compensation. (App. p. 4a). The "right of control" test applied by the Board (180 N.L.R.B. No. 137) was less significant under the facts of this case because, according to the court, there was minimal skill, independence, and personal judgment involving these deliverers than in the cases cited to the court.[6] The court below, then, applied a test completely different than the test applied by the Board. The Board noted that the case pivoted on whether

> "the deliverer has stepped into the shoes of the predecessor trucking company as entrepreneur, or

[6] *Meyer Dairy, Inc.* v. *N.L.R.B.*, 429 F.2d 697 (10th Cir. 1970); *Carnation Co.* v. *N.L.R.B.*, 429 F.2d 1130 (9th Cir. 1970)

> whether the entrepreneur has been eliminated. The answer to this question depends on whether it may be said that the deliverers worked for wages with a right of control over performance of their jobs reserved to the Employer, or whether, like independent contractors, they undertake the job for a price, decide how the work will be done, exercise their own discretion in performing the work, and depend for their income not upon wages, but upon profits." 180 N.L.R.B. No. 137.

Moreover, the Court failed to mention, much less distinguish, *N.L.R.B.* v. *A.S. Abell Co.*, 327 F.2d 1 (4th Cir. 1964) or *Frito-Lay, Inc.* v. *N.L.R.B.*, 385 F.2d 180 (6th Cir. 1967).

REASONS FOR GRANTING THE WRIT

Effectively, the Court below discounted the "right of control" test sought to be applied by the Board in this case and, instead, held to be critical the fact that changes affecting the end result of the delivery contract were made at the insistence of the petitioner and that the petitioner was the sole judge whether such changes merited adjustment in compensation Moreover, the Court ratifies the error of the Board in primarily relying upon the low profit potential for and the limited skill needed by the truck-driver delivery men. In that regard the Court deviated from the test properly set out by other circuits in *Carnation Co.* v. *N.L.R.B.*, 429 F.2d 1130 (9th Cir. 1970); *Frito-Lay, Inc.* v. *N.L.R.B.*, 385 F.2d 180 (7th Cir. 1967); and *N.L.R.B.* v. *A.S. Abell Co.*, 327 F.2d 1 (4th Cir 1964). Additionally, this case presents questions affecting a vast number of newspapers in this country which utilize distribution arrangements similar to those involved

in this appeal. See Amicus Curiae Brief in *Herald Co.* v. *N.L.R.B.*, No. 71-387, now pending in this Court.

A. The Conflict of the Circuits

In *Carnation Co.* v. *N.L.R.B.*, 429 F.2d 1130 (9th Cir. 1970) the Board found that Carnation's wholesale distributors were employees under the Act. These distributors were granted exclusive licenses to sell Carnation's products in a particular geographic area. All distributors purchased their trucks and equipment from Carnation on conditional sales contracts, secured by an assignment of the distributors' accounts receivable. Distributors' revenue was required to be deposited in a joint bank account with Carnation, from which funds could be withdrawn only over the joint signatures of the distributor and a Carnation official. The Board asserted that the economic control exercised by Carnation over its distributors was sufficient to justify its determination that the drivers were employees.

The distributors in *Carnation Company* were not permitted to sell any competitive product. They were required to display on their trucks any advertising supplied by Carnation and also were required to paint their vehicles in a specific manner. If the distributor breached his agreement, Carnation had the right to terminate with only one day notice. Upon termination, the distributor was obligated to resell his accounts receivable to Carnation. Carnation also had the right to take title to any vehicle upon which a balance was owing without the duty to account for the distributor's equity.

The Ninth Circuit recited general principles of agency as applicable in determining the status of Car-

nation's distributors and dismissed the Board "economic control" arguments by stating:

> "Most of the facts which the Board now asserts to be proof of Carnation's retention of the power to control its drivers are facts (economic rights and sanctions) which can be found in a variety of 'franchise' arrangements oriented toward brand-name protection and market penetration. In such cases there is no attempt to supervise the details of the work, and no assertion that the franchise holder is anything but an independent business man." *Carnation Company* v. *N.L.R.B.*, 429 F.2d at 1132.

Although the distributors in *N. L.R.B.* v. *A.S. Abell Co.*, 327 F.2d 1 (4th Cir. 1964), performed a sales function, their primary responsibility was delivery of newspapers; and in that regard *Abell* is helpful in deciding this case, for those distributors were found to be independent contractors under the Act The *de minimus* controls exercised by the publisher in *Abell* are substantially similar to those exercised by the News-Journal. In the instant case, as in *Abell*, the essential business decisions concerning the operation of the route are within the discretion of the haulers. Like most independent businessmen, they may either reap the profits or bear the losses which result from their judgment.

In *Frito-Lay, Inc.* v. *N.L.R.B.*, 385 F.2d 180 (7th Cir. 1967) the distributors financed, insured and maintained their own vehicles; had their own bank accounts and filed individual income tax; determined the order of route stops; and were free to hire helpers at their own discretion. The Company did not pay workmen's compensation, unemployment insurance, social security, and did not withhold income taxes. Again, as with *Abell* and *Carnation*, the income of the distributor de-

pended entirely upon his ability to handle his route and the efficiency with which he operated his equipment.

Yet, the Court below found these cases to be inapposite because those drivers primarily performed a retail sales function. But the Court overlooked the point that the factors considered by the circuits in those decisions compel the conclusion that the deliverers in the instant case are truly independent contractors. The criteria relied upon by the Court below provide the Board with authority to find, on a wholesale basis, that in relationships with conflicting indicia of employee and independent contractor status the relationship is one of employment. After all, in practically every independent contractor arrangement there will be some evidence that can be characterized as indicating employment status. The point is that in a case where, as here, the question is close, the Board's reliance on extraneous factors such as "economic control" or "low profit potential" or minimal control over the end result, is, as these three cases disclose, wholly improper.

B. The Preponderance of the Evidence Clearly Established That the Contract Haulers Are Independent Contractors Because They Control the Manner and Means of Delivering Newspapers While the Company Controls Only the Result, i.e., the Delivery Points

Section 2(3) of the Act, 29 U.S.C. § 152(3) (1934) expressly provides that the term "employee" shall not include "any individual having the status of an independent contractor." As has been stated by the National Labor Relations Board, the legislative history of the 1947 amendments to the Act clearly shows that Congress intended that the Board recognize as employees "those who work under direct supervision," and as independent contractors, those who "undertake a job for a price, decide how the work will be done,

usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials and labor and what they receive for the end result, that is, upon profits." *Los Angeles Evening Herald and Express Division of Hearst Publishing Company, Inc.*, 102 N.L.R.B. 102, 107-108 (1953).[7]

In determining whether the contract haulers in the present case are independent contractors and not employees subject to the Act, the familiar "right of control" test must be employed. In *Pure Seal Dairy Co.*, 135 N.L.R.B. 76, 79 (1962), quoted with approval by the Seventh Circuit in *Frito-Lay, Inc.* v. *N.L.R.B.*, 385 F2d 180, 187 (7th Cir. 1967), the Board said:

> "Where the person for whom the services are performed retains the right to control the manner and means by which the result is to be accomplished, the relationship is one of employment. On the other hand, where control is reserved only as to the result sought, the relationship is that of an independent contractor. The resolution of this question depends upon the facts of each case and no one factor is determinative."

The clear preponderance of the relevant evidence shows that the individual contract haulers involved are independent contractors, rather than employees. The following factors present in this case establish a lack of the requisite control by the Company over the means by which these haulers must perform their respective jobs: the identity in function and method of operation

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[7] See also H.R. Rep. No. 245, 80th Cong., 1st Sess. 18 (1947); H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 32 (1947); *Squirt-Nesbitt Bottling Corp.*, 130 N.L.R.B. 24 (1961); *Golden Age Dayton Corp.*, 124 N.L.R.B. 916 (1959); and Restatement (Second) of Agency § 220.

between the contract haulers and their predecessors, the trucking companies (T. 26, 29-31); contract provisions specifically define the status of the haulers as independent contractors, exclude the Company from control over the ways and means of performance, and limit the Company's sole interest to the result of performance (JA 103);[8] costs and expenses of operation are the exclusive responsibility of the hauler; the hauler's method of operation including sequence of delivery is within his discretion (T. 134, 151-152, 229, 440, 445); there is no direct supervision of haulers by the Company (T. 72, 75-76, 139, 152); personal contact between haulers and Company District Managers is casual, infrequent, and not of a supervisory nature (T. 74, 76, 256); haulers may and do take on other business on and off routes (T. 95, 455); special tasks are specially compensated by prior agreement (T. 94, 129-130, 225-226, 377, 393, 448); net compensation is the difference between compensation for services by the Company and costs of doing business not subject to reimbursement by the Company (Exhibit E. 5); haulers determine for themselves whether to hire helpers or substitutes, and what their holidays and vacations shall be[9] (T. 97, 154, 263,

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[8] It is obvious that the contract on its face does not create an employment relationship, and although this fact is not necessarily dispositive, it is of substantial import and should not have been as lightly dismissed as was done by the Board below. *N.L.R.B.* v. *A. S. Abell Co.*, 327 F.2d 1 (4th Cir. 1964); *Site Oil Co. of Missouri* v. *N.L.R.B.*, 319 F.2d 86 (8th Cir. 1963); *United Insurance Co. of America* v. *N.L.R.B.*, 304 F.2d 86 (7th Cir. 1962).

[9] The Board in its Decision and Direction of Election (JA 2) found that the haulers could hire others only in the event of illness, vacation, or excusable neglect However, there is not one scintilla of evidence to support this restrictive interpretation. Indeed, paragraph 2 of the contract provides that the contractor "shall transport and deliver or *shall cause to be transported and delivered* . . ." (Emphasis added)

334, 447): the Company does not maintain personnel records of haulers for fee or tax purposes nor does the Company absorb such expenses (T. 177-179): and haulers are not required to display Company signs or identification. (T. 94, 129-130).

Substantial reliance appeared to be placed by the Board on the fact that the services rendered by the contract haulers consist of "routine manual work of loading and driving trucks over agreed-upon routes and dropping off bundles of newspapers properly and in a pre-arranged sequence or order at designated drop spots." Rather than restricting itself to applying the "right of control" test, the Board sets new ground and now apparently measures the amount of ingenuity required by a job to determine whether the job can be the subject of an independent contract. Clearly, such a test is foreign to the determination of employee-independent contractor status under the Act. The amount of skill, intelligence, or ingenuity required by a job is not at all related to or a function of the *right* of the purported employer to control the manner and means of accomplishing a result.

The Board additionally erred in its characterization of the Company's supervision over the haulers as exerted control over the manner and means of attaining delivery. Instead, whatever control exercised by the Company over the haulers involves the result. For example, the Company designates where the bundles are to be delivered. Obviously, this is properly characterized as controlling the result for the essence of the contract is to get newspapers from one place to another. That these destination points periodically change does not affect this characterization. Indeed,

paragraph 2 of the written contracts with the haulers provides that the haulers shall deliver newspapers to "such addresses as may from time to time be designated" by the News-Journal (JA 103).

The evidence establishes that insurance against liability is regarded by the Company as a desirable protection although not a *sine qua non* of the contractual arrangement (T. 150-151, 156-157). The contract itself specifies merely that the contract hauler hold the Company harmless against liability. In any event, even were insurance required, this has not been treated as a significant factor tending to indicate an employee rather than an independent contractor relation, particularly where the Company does not pay the cost. See *Frito-Lay, Inc.* v. *N.L.R.B., supra* at 2544; *National Van Lines, Inc.* v. *N.L.R.B.*, 273 F.2d 402, at 406 (1960).

The Board scored the conditions of the contract because, as the Board states, the haulers "cannot decide when or whether they will go out on an assigned route." (JA 11). Such a position is tantamout to saying that haulers are employees because they are required to perform their contracts. Somewhat surprisingly, the Board and the Court below overlook, the fact that this is the essence of the object of the contract. If the newspapers are not delivered and on time, the contract is not performed. Obviously, this requirement affects the result. If, by this statement, the Board sought to imply that only the contrac hauler could accomplish the delivery of newspapers, it clearly is in error. Paragraphs 2 and 3 of the contract clearly permit the hauler to subcontract or hire substitutes. (JA 103).

CONCLUSION

Because there appears to be a conflict among the Circuits and because improper criteria and tests were utilized by the Board and the Court below in determining the status of the haulers herein, this petition should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19,252

THE NEWS-JOURNAL COMPANY, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

On Petition To Review an Order of the National Labor Relations Board

Argued June 10, 1971

Before STALEY, ADAMS, *Circuit Judges* and GARTH, *District Judge*

Opinion of the Court

(Filed July 12, 1971)

ADAMS, *Circuit Judge.*

The question in this case is whether the record before us clearly precludes the decision of the National Labor Relations Board that the truck-driver deliverymen of the News-Journal Company are employees rather than independent contractors.[1]

[1] "The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both." Universal Camera Corp. v. NLRB, 340 U.S. 474, 490 (1951).

We approach the problem with the realization that we are not to function as a "judicial echo" for the conclusions of the NLRB,[2] and that "[w]hether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Court of Appeals." However, we also recognize that the application of these principles does not "mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*."[3]

This case is here on the petition of the News-Journal Company to review and set aside an order of the NLRB and upon the petition of the NLRB to enforce its order.[4] The News-Journal publishes and delivers newspapers in and around Wilmington, Delaware. Some years ago, in order to improve the efficiency of its circulation department, it automated the mail room and terminated its contracts with the independent trucking companies that delivered the bundles of newspapers from the plant to the carriers and dealers. The laid-off mail room employees were offered the delivery routes and were given severance pay and an opportunity to finance their own trucks. Eventually, 21 persons, including some of the mail room employees, performed this service for the News-Journal.

From the beginning of this new arrangement, the News-Journal considered these men to be independent contractors. Each signed an explicit contract with the News-Jour-

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[2] *Id.*, at 491.

[3] *Id.*, at 488, quoted in NLRB v. United Insurance Company, 390 U.S. 254, 260 (1968).

[4] The decision and direction of election is reported at 180 NLRB No. 137 (1970); the bargaining order is reported at 185 NLRB No. 40 (1970).

nal.[5] Social Security and other taxes were not withheld from the amounts payable to them. They were free to use their trucks in any manner that did not interfere with the delivery of the papers.[6] Vacations, substitute drivers, and helpers were all matters left to their sole discretion. The record contains additional evidence which would tend to indicate that these men were in fact independent contractors.[7]

On the other hand, there is evidence in the record that these deliverymen enjoyed a somewhat different status. For example, despite the fact that the contract was ostensibly result-oriented, the News-Journal insisted that the drivers be present at the loading dock long before the papers were actually ready to be loaded. District Managers frequently met with the drivers while they were en route in order to discuss matters with them. These officials performed checks to see that the papers were properly delivered, and ordered changes as they saw fit. On occasion, the company compelled the drivers to deliver addi-

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[5] At the time of the hearing, only 18 of the 21 contracts were produced. In the contract, the drivers were referred to as "contractors." Under its terms, a driver was obligated to deliver papers as designated from time to time by the company, to furnish and maintain his own equipment and to indemnify the company from any loss. The contract provided that its terms were suspended whenever publication of the papers was suspended. It further provided that it could be amended only in writing, and that it could be terminated on thirty days' notice by either party or without notice by the company in the event of breach by the driver.

[6] At various times, drivers used their trucks on other jobs, such as collecting trash or delivering pastries. One driver even serviced a delivery route for a Philadelphia newspaper.

[7] For example, there was no requirement that the trucks be painted in any uniform or distinctive manner. If a truck carried advertisements for the News-Journal, the driver received additional compensation.

tional items, such as "stakes and tubes" and "honor boxes."[8]

We recognize that the maintenance of an effective circulation department by a large newspaper requires precise adherence to, as well as frequent amendment of, the delivery schedule. Therefore, the fact that the delivery spots and number and contents of the bundles were changed often, and that opportunities for variation in the order of delivery, or the routes utilized were somewhat limited are, by themselves, important but not decisive. Similarly, the fact that the contracts were often amended orally, and with little or no notice, is also not determinative. What is critical is that the vast majority of the changes were made at the insistence of the News-Journal and that the company was the sole judge whether such changes merited corresponding adjustment in compensation.

In NLRB v. United Insurance Company, *supra,* the Supreme Court considered the congressional intent in excluding independent contractors from the coverage of the NLRA and concluded that "there is no doubt that we shou'd apply the common law agency test here in distinguishing an employee from an independent contractor."[9] The Court, however, could not identify any one facet of the relationship as determinative, but rather stated:

> ". . . In a situation as this, there is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual

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[8] "Stakes and tubes" are the devices to hold newspapers commonly seen along rural roads. "Honor boxes" are newspaper vending machines.

[9] 390 U.S. at 256.

context is assessed in light of the pertinent common-law agency principles."[10]

It is unfortunate that in this case the NLRB expressed its conclusion in terms of a single test: whether "the News-Journal Company has in practice reserved to itself the right to control the basic manner and means, as well as the result, of the deliverers' work."[11] If we were convinced that the Board narrowly examined the record with only this in mind, we would be constrained to remand this matter for a proper consideration of the evidence. However, it is clear that the Board did consider the type of services rendered, the possibility of realizing additional profits through the exercise of entrepreneurial skill and the ownership and maintenance of the vehicles. In addition to examining the language of the contract, the Board weighed the practice of the parties, the skill required of the deliverymen, the mode of compensation for additional duties, and the methods of applying corrective and disciplinary measures. In light of this, we can say only that the NLRB chose between "two fairly conflicting views."[12] We cannot say that they applied the wrong criteria.

The Court has carefully considered Meyer Dairy, Inc. v. NLRB, 429 F.2d 697 (10th Cir. 1970), and Carnation Company v. NLRB, 429 F.2d 1130 (9th Cir. 1970), and has found them inapposite. In those cases, the drivers primarily performed a retail sales function, and their status was more nearly analogous to that of franchisees. In such a situation where skill, independence, and personal judgment contribute heavily toward the success of the enterprise, the "right of control" test becomes more significant,

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[10] *Id.*, at 258.

[11] 180 NLRB at ——.

[12] NLRB v. United Insurance Company, 390 U.S. at 260.

since the actual or potential exercise of that control can stifle the entrepreneurial talents of the drivers.

In The Herald Company v. NLRB, Nos. 34620, 34791, 34935 (2d Cir., decided June 11, 1971), the Court examined a factual situation similar to those found in *Meyer Dairy* and *Carnation, supra*, and reached a contrary result. The Herald Company's distributors bought their papers wholesale and sold them retail, enjoyed a proprietary interest in their routes, and conducted many activities independent of or in competition with the Company. Nevertheless the Court found substantial evidence that the Company maintained and exercised supervision over the performance of the distributors' duties, that the Company could control the value of the distributorships by threatening not to renew the contracts, and that the Company could regulate the distributors' immediate income by juggling wholesale prices and extracontractual payments.[13]

Here, the drivers perform primary delivery functions, and do not resell the newspapers at a profit. What would be the manner of achieving the result in a context such as that found in *The Herald Company, supra, Meyer Dairy, supra*, or *Carnation supra*, is the sought-after result, itself, in this setting. Accordingly, these cases provide guidance but no governance.

The petition to review will be denied and the petition to enforce the bargaining order will be granted.

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[13] Although the Court quoted the NLRB's interpretation of the Supreme Court's common law agency test from News Syndicate Company, Inc., 164 NLRB 423, 428 (1967) (right to control manner by which result is accomplished), it is clear that it did not restrict itself solely to the application of that criterion.

Judgment

Before: Staley, Adams, Circuit Judges and
Garth, District Judge.

THIS CAUSE came on to be heard upon a petition to review, and a cross-application for enforcement of an order of the National Labor Relations Board dated August 27, 1970, against The News-Journal Company, its officers, agents, successors, and assigns. The Court heard argument of respective counsel on June 10, 1971, and has considered the briefs and transcript of record filed in this cause. On July 12, 1971, the Court being fully advised in the premises handed down its opinion granting enforcement of the Board's Order.

ON CONSIDERATION WHEREOF, it is hereby ordered and adjudged by the United States Court of Appeals for the Third Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that The News-Journal Company, its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said Order contained.

IT IS FURTHER ORDERED that costs shall be taxed against the Petitioner.

BY THE COURT

/s/ .....
Circuit Judge

D(954: August 19, 1971

190 NLRB No. 137

D-3508
Wilmington, Del.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 4-RC-8171

THE NEWS-JOURNAL COMPANY,[1] *Employer*

and

NEWSPAPER GUILD OF GREATER PHILADELPHIA, AMERICAN NEWSPAPER GUILD, AFL-CIO, *Petitioner*

Decision and Direction of Election

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Gordon L. Fine, Hearing Officer. Following the hearing and pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended, and by direction of the Regional Director for Region 4, this case was transferred to the National Labor Relations Board for decision. Both the Employer and the Petitioner filed briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds no prejudicial error. The rulings are hereby affirmed.

Upon the entire record in this case, the Board finds:

1. The News-Journal Company is a Delaware corporation engaged in the business of publishing and distributing newspapers in and around Wilmington, Delaware. The dollar

[1] The name of the employer appears as amended at the hearing. 190 NLRB No. 137.

volume of sales from its facilities in Wilmington directly to customers outside the State of Delaware exceeds $50,000 annually. The dollar volume of purchases from outside the State of Delaware exceeds $50,000 annually. The parties stipulated, and we find, that the Employer is engaged in commerce within the meaning of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The Petitioner seeks a unit of 21 newspaper deliverers who are engaged in the bulk distribution of the Employer's newspapers. The Employer contends that the petition should be dismissed because the deliverers are not, within the meaning of Section 2(3) of the Act, employees, but rather are independent contractors.[2]

The News-Journal Company, hereinafter called the Company or the Employer, publishes two newspapers, the Morning News, hereinafter called the News, and the Evening Journal, hereinafter called the Journal. The distribution and sale of the newspapers is performed under the direction of the circulation department, which also includes the mailroom. It is here that the papers are counted, sorted into bundles, and labeled according to a prearranged order for delivery by the 21 deliverers to the Company's carrier boys and motor route operators, who deliver the papers to the ultimate purchaser.

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[2] "Sec. 2. When used in this Act— . . . (3) the term 'employee' . . . shall not include . . . any individual having the status of an independent contractor, ..."

In the early 1960's, the Company began to phase out the independent trucking companies which, under contract, were supplying their own trucks and drivers and delivering the paper bundles from the plant. At about this time, the Company also automated its mailroom, thus necessitating the layoff of a substantial number of mailroom employees. To nine of these employees, the Company offered contracts which constitute agreements under which these men supply their own trucks and deliver the paper bundles from the Company plant to such addresses as may from time to time be designated by the Company along routes in specified territories. In return for this service, the contracts provide for weekly payment by the Company of a fixed sum of money for such delivery of each edition of the paper. These individuals purchased their own trucks and now perform the same delivery function formerly performed by the truck drivers of the independent trucking companies. New drivers have also been taken on, and now there are 21 deliverers. However, only 18 written contracts were submitted in evidence. The testimony indicates that the three missing contracts were not found in a search of the Company files. It is not clear whether the contracts were simply lost or were never executed in the first place. The three deliverers without contracts allegedly operate under understandings generally similar in terms to the written contracts. One such driver, however, additionally services honor vending boxes owned by the Company.

In addition to the provisions as to route territories to be serviced, the remuneration therefor, and the furnishing of operating equipment at the deliverer's expense, the contracts expressly provide that the deliverer shall transport and deliver the papers daily, regularly, and promptly, and shall exercise due diligence to protect the papers from damage from handling or the elements; that the deliverer shall make such transportation and delivery of papers at his own risk and expense and according to his own discretion, means, and methods of control, which shall

not be subject to the control or supervision of the Company; that the contractor-driver shall not be considered an agent, servant, or employee of the Company, it being expressly agreed that the driver shall have the status of an independent contractor and shall control the ways and means of performing his several obligations under the contract; that the driver shall hold the Employer harmless for any damage arising out of his performance; that the contract shall continue in effect until terminated upon proper notice by either party, as provided therein; that the contract may also be terminated without notice by the Company at any time upon breach by the driver of any of the provisions; and that the contract contains the entire agreement between the parties and its terms shall not be changed, modified, altered, or supplemented except in writing signed by the parties.

The distribution function of the Employer is organized in the following manner. Each deliverer is assigned a route or routes for the delivery of one or more editions of either the News or the Journal, or both. When a route-territory becomes available because a deliverer has quit or the distribution territories are reorganized, the distribution manager, who organizes the routes, may either put up the route for bids or may ask a driver whether he would like to take over another route. In the former case, the route is posted for bids on the bulletin board of the mailroom and the drivers and their acquaintances then bid on it. The available route is not publicly advertised. The distribution manager and his superiors then determine which bid to accept, having considered the bidders' equipment and their employment histories. The lowest bid is not always accepted. A contract is signed describing the route to be serviced and stating the agreed-upon price. When a route is not put up for bids, the price will be fixed by agreement between the Empolyer and a selected deliverer. Thereafter, however, the route-territory may be added to, split up, or consolidated with an other route,

and with most routes this has been done. In these cases, the driver's oral agreement to the reorganized route and to any adjustment in compensation is secured, but no new contract, as such, is drawn up and signed. Rather, the route changes are noted on the driver's route description record in the mailroom and his rate of compensation is adjusted on the financial records of the Company. When such route-territory changes are necessary because of changed conditions, they are initiated by the distribution manager, but such changes have also been made at the request of drivers for their own accommodation.

Having his route assignment, the deliverer is required to report to the loading dock at least 15 minutes before his edition is due; if the edition is late, he may wait another half hour before he can start loading. The mailroom bundles his papers and sends them down a chute in a prearranged and labeled drop-spot sequence according to the driver's route description. The deliverer loads his paper bundles and proceeds to drop them off at the prearranged spots for the carrier boys and motor route operators to pick them up. The deliverer is free to drop them off out of sequence, if he so desires, but time limitations must be met. The driver must be careful not to damage the bundles in dropping them off and, to make them salable, must deliver them promptly. These delivery services are performed without on-the-spot Employer supervision of the driver. However, if bundles are improperly dropped off, damaged, in the wrong spot, or out of order, the district managers who supervise the carrier boys and motor route operators talk to the deliverers about it, if necessary report them to the distribution manager, and may even effectively recommend the termination of the deliverers, if the latter do not cooperate. The record shows that a district manager effectively recommended the termination of an uncooperative driver.

Drop spots are frequently changed and bundles are split or consolidated, depending on the needs of the carrier

boys and motor route operators. Such drop-spot changes are initiated by the district managers, who issue change orders which are approved by their supervisors and are relayed via the mailroom to the deliverers, who effectuate the drop-spot changes. Such drop changes and the split or consolidation of deliverers' routes may, and frequently do, increase or decrease a deliverer's route mileage, number of papers, bundles, drop-spots, and route service time. Since a deliverer's compensation is based on these factors, they may and have resulted in additional compensation, if such increases are substantial. However, as noted below, this does not always follow.

Because of this procedure, the contract provisions relating to compensation and the delivery routes are, in most cases, not current and are incorrectly stated in the contracts. For instance, driver Bayne's contract provides for compensation of $75 per week and delivery of 1 route in a certain area, whereas he actually receives $210 per week and delivers 2 routes in an entirely different area. This situation and practice is contrary to the contract provision requiring all contract changes to be in writing signed by the parties. Moreover, the Employer has occasionally made substantial increases in the loads and route coverage of some of the deliverers without effecting corresponding changes in their rates of compensation. For instance, in one case a net total of 800 papers was added to a deliverer's load, and in another, three drop-spots and accompanying paper loads were added on, increasing the route mileage by about 5 miles; in both instances, the deliverers were not paid any additional compensation.

Normally, the Employer does not reimburse the drivers for their expenses; however, the Employer does pay an annual license fee of $22 for four drivers in the town of Elsmere, apparently without reimbursement by the drivers. The Employer maintains no personnel records, as such, on

the drivers. For some special tasks, such as delivery of mailbags to post offices, the drivers receive special compensation; for others, such as delivery of stakes and tubes, they do not. The total amount of time spent by each driver in performing Company deliveries in most cases adds up to a greater portion of a full work day. However, a number of the drivers have at one time or another operated sales or distribution routes for other items, ranging from trash to bakery products. It appears that a majority of the drivers have no regular source of income other than the Employer's delivery routes.

The Petitioner contends that the deliverers are not independent contractors, as provided by the contracts, but rather are employees of the Company, because the Company controls the manner and means by which they do their work, within the meaning of the Board's "right of control" test.[3] Petitioner points to the fact that the Employer may reorganize the deliverers' routes at will, as noted above, has sometimes done so without commensurate compensation, and exercises supervision over them through the district managers' drop spot change orders and instructions as to proper delivery of the paper bundles. Moreover, the Petitioner contends, the timing of the delivery of the various editions to insure their salability necessitates close integration of function, and supervision is necessarily required to keep the distribution process properly operating. The deliverers have no proprietary interest in their routes and hence cannot sell or assign them. The fact that the deliverers own their trucks, hire their own temporary replacements, and may use their trucks in any manner they see fit during off hours are, according to the Petitioner, not controlling factors in the determination as to whether they are employees within the meaning of the Act.

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[3] *San Antonio Light Division*, 174 NLRB No. 97.

The Employer contends, to the contrary, that a preponderance of the record evidence shows that the deliverers are independent contractors, rather than employees, because the Company lacks control over the manner and means by which the deliverers perform their jobs. The following factors are cited in support of its position: the present function and method of operation of the deliverers is the same as that of their predecessors, the trucking companies; the contract provisions specifically define the status of the deliverers as that of independent contractors, exclude the Company from control of the ways and means of performance, impose costs and expenses of operation exclusively on the deliverers, and indicate that the Company's sole interest is in the result of performance; the deliverer is free to make changes in the prearranged sequence of delivery of the drop-spot bundles and, to that extent, in his route; there is no direct supervision of the deliverers by the Company; deliverers may take on other business, provided it does not interfere with their servicing of their routes; special tasks, such as the delivery of mail bags to the post office, are specially compensated by prior agreement; a deliverer's net compensation is the difference between the fixed contract compensation for services paid by the Company and the costs of doing business, almost none of which is subject to reimubrsement by the Company; deliverers determine for themselves whether to hire helpers or substitutes, and when their holidays and vacations shall be; the Company, with a minor exception, as noted above, does not maintain personnel records of the deliverers for fee or tax purposes or cover such expenses; and deliverers are not required to display Company signs or identification on their vehicles unless they want to, and in such cases are specially compensated for advertising by a supplemental contract.

As to the variations in the terms of the contracts, the Employer contends, the parties have a right mutually to accomplish any change they wish, despite the express pro-

visions requiring that all amendments be in writing, and the orally agreed changes in routes and compensation are effective modifications and cannot be taken to abrogate the basic contracts themselves. As to the practice of frequently ordering changes in the drop spots and contents of the drop bundles, this is a condition of the newspaper distributing business, and, as such, is provided for by the terms of the deliverers' contracts, which obligate them to deliver to such places as may from time to time be designated by the Employer. And the fact that changes are not accomplished directly by the district managers, but through written orders of the managers approved by the distribution manager and transmitted by the mailroom at pickup time to the deliverers, shows, according to the Employer, that there is no direct supervision of the drivers. The Employer also contends that such changes do not in any manner constitute control of the ways and means of performing the job, but affect merely the result. The evidence further establishes, the Employer notes, that the contracts provide that the deliverers shall save the Company harmless from liability for any damage resulting from the deliverers' performance under the contracts, but they do not require the deliverers to carry liability insurance. Lastly, the evidence shows that the actual route time of the deliverers, in practically every instance, does not add up to a full workday, so that there remains opportunity for the deliverers to perform outside jobs, and many of them do.

Thus, the question arises whether the deliverer has stepped into the shoes of the predecessor trucking company as entrepreneur, or whether the entrepreneur has been eliminated. The answer to this question depends on whether it may be said that the deliverers work for wages with the right of control over performance of their jobs reserved to the Employer, or whether, like independent contractors, they undertake the job for a price, decide how the work will be done, exercise their own

discretion in performing the work, and depend for their income not upon wages, but upon profits. We believe that the relationship between the Company and the drivers is properly characterized as one of employer and employee, as that relationship is described in *Pure Seal Dairy Co.*, 135 NLRB 76 at 79:

> Where the person for whom the services are performed retains the right to control the manner and means by which the result is to be accomplished, the relationship is one of employment. On the other hand, where control is reserved only as to the result sought, the relationship is that of independent contractor. The resolution of this question depends upon the facts of each case and no one factor is determinative.

The services rendered almost exclusively consist of the routine manual work of loading and driving trucks over agreed-upon routes and dropping off bundles of newspapers properly and in a prearranged sequence or order at designated drop spots. The possibility of realizing any meaningful added profit by changing the established method of operation appears to be very limited. While the deliverers own their trucks and have the added responsibility of maintaining them in good operational condition, the ownership and maintenance of the vehicle alone is not a controlling factor in a determination of this type.[4] The deliverers retain practically no independence in their operations; they cannot decide when or whether they will go out on an assigned route; they cannot fix the time of delivery; and they cannot determine that others should drive their vehicles, except in cases of illness, vacation, or excusable absence, when they provide and pay for their own substitutes. Although they may hire and pay for additional helpers, the

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[4] *San Antonio Light Division, The Hearst Corporation*, 174 NLRB No. 97; *San Antonio Light Division, The Hearst Corporation*, 167 NLRB No. 99; and *Frito Lay Inc.*, 167 NLRB No. 11.

record does not show that such helpers are hired on any regular basis.[5]

Thus, the express provisions of the contracts purporting to create independent contractor relationship notwithstanding (and we note that there do not even appear to be any written contracts for three of the drivers), the practice of the parties shows that the deliverers do not act as independent contractors. The territories and drop spots are predetermined by the distribution and district managers. All that remains to be done is the physical work of loading, truck driving, and dropping off the paper bundles. There is no room for the exercise of true discretion in the performance of the work. The drop spots are changed, without consultation, by written orders of the district manager which are relayed to the deliverers by the mailroom at pickup time. The deliverers may not receive added compensation for some of these changes. The district managers tell the deliverers how to properly drop off their bundles and rely on the distribution manager for further corrective and disciplinary measures. There is necessarily close supervision of the deliverers to insure proper and timely delivery of the paper to the ultimate subscriber.

Upon the entire record, we find that the News-Journal Company has in practice reserved to itself the right to control the basic manner and means, as well as the result, of the deliverers' work. We thus find that the deliverers are not independent contractors, but employees of the Company within the meaning of the Act.

Accordingly, we find that a unit of the following employees is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All newspaper deliverers employed in the circulation department of the Employer's Wilmington, Delaware, newspaper business, excluding all other employees, and all supervisors as defined in the Act.

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[5] One of the deliverers, Wilson, also services paper vending machines, for which purpose he hires a helper. This service is specially compensated.

Direction of Election

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 30 days from the date below. The Regional Director for Region 4 shall direct and supervise the election, subject to National Labor Relations Board Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[6] Those eligible shall vote

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[6] In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236; *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759. Accordingly, it is hereby directed that a selection eligibility list, containing the names and addresses of al lthe eligible voters, must be filed by the Employer with the Regional Director for Region 4 within 7 days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

whether or not they desire to be represented for collective-bargaining purposes by Newspaper Guild of Greater Philadelphia, American Newspaper Guild, AFL-CIO.

Dated, Washington, D. C., Jan. 21, 1970.

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FRANK W. McCULLOCH, *Chairman*

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JOHN H. FANNING, *Member*

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HOWARD JENKINS, JR., *Member*

NATIONAL LABOR RELATIONS BOARD

(SEAL)

185 NLRB No. 40

D-4261
Wilmington, Del.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case D-CA-5212

THE NEWS-JOURNAL COMPANY

and

NEWSPAPER GUILD OF GREATER PHILADELPHIA,
LOCAL 10, AFL-CIO

Decision and Order

Upon a charge filed by Newspaper Guild of Greater Philadelphia, Local 10, AFL-CIO, herein called the Union, the General Counsel for the National Labor Relations Board, by the Regional Director for Region 4, issued a complaint and notice of hearing dated April 24, 1970, against The News-Journal Company, herein called Respondent, alleging that Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing were duly served upon Respondent and the Union.

The complaint alleges in substance that on February 26, 1970, the Union was duly certified in Case 4-RC-8171 (not published in NLRB volumes) as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate by the Board in its Decision and Direction of Election dated aJnuary 21, 1970 (180 NLRB No. 137), and that since on or about March 10, 1970, Respondent has refused, and is refusing, to recognize and bargain with the Union as such exclusive bargaining representative, although the Union has requested it to do so.

On May 13, 1970, Respondent filed its answer, admitting that it had been served with the charge herein, that its volume of business meets the Board's jurisdictional standards, that it engages in commerce within the meaning of the Act, that the Union is a labor organization within the meaning of the Act, that the Union was chosen by a majority of the employees in the unit found appropriate to be their exclusive collective-bargaining representative, that the Union was certified by the Board thereafter, and that Respondent has refused to bargain with the Union. Respondent denied, however, the remaining parts of the complaint which alleged that the Union was the representative of an appropriate unit of Respondent's newspaper deliverers and that the Union has requested, and is requesting, Respondent to bargain with the Union; Respondent contends in its answer that the newspaper deliverers who comprise the appropriate unit are independent contractors, not employees within the meaning of the Act, and thus not entitled to representation.

On May 28, 1970, the General Counsel filed with the Board a Motion for Summary Judgment.

On June 2, 1970, the Board issued an Order transferring the proceeding to the Board and requesting Respondent to show cause why the General Counsel's Motion for Summary Judgment should not be granted.

On June 10, 1970, Respondent filed a Cross-Motion for Summary Judgment requesting the Board to dismiss the complaint and set aside the election and certification.[1]

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

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[1] Respondent's request for oral argument before the Board is hereby denied as the record and briefs adequately present the issues and the positions of the parties.

Upon the entire record in this case, the Board makes the following:

Ruling on the Motion for Summary Judgment

The record before us establishes that on February 27, 1969, the Union filed a petition in Case 4-RC-8171, seeking to represent all newspaper deliverers at Respondent's Wilmington, Delaware, location. After a hearing, the Regional Director for Region 4 transferred the case to the Board for decision. In its Decision and Direction of Election dated January 21, 1970, the Board found appropriate for collective bargaining the following unit of employees:

> All newspaper deliverers employed in the circulation department of the Employer's [Respondent] Wilmington, Delaware, newspaper business, excluding all other employes, and all supervisors as defined in the Act. (180 NLRB No. 137)

On February 17, 1970, pursuant to the Decision and Direction of Election, an election was held in which a majority of the employees of Respondent in the unit described above designated and selected the Union as their representative for the purposes of collective bargaining with Respondent. There were no challenged ballots or objections to the conduct of the election, and, on February 26, 1970, the Regional Director for Region 4 issued his Certificate of Representative.

Respondent thereafter admittedly refused to bargain with the Union upon the latter's request, and the instant refusal to bargain charge was filed on April 10, 1970.

In its statement in opposition to the General Counsel's Motion, and in support of its Motion, Respondent contends that the Union's certification in the underlying representation proceeding is invalid because the newspaper deliverers represented by the Union are independent contractors, not employees within the meaning of the Act, and, thus, not entitled to representation. It appears, however, that Respond-

ent is attempting to do no more than relitigate in the instant proceeding issues which were previously decided by the Board in the underlying representation case. It is well established that in the absence of newly discovered or previously unavailable evidence, an employer is not entitled to relitigate in a Section 8(a)(5) proceeding issues which were, or could have been, raised in the underlying representation proceeding. Accordingly, as no such evidence bearing on the status of the newspaper deliverers has been presented, we find without merit Respondent's claim that the election conducted in the representation proceeding is invalid because the unit was not comprised of "employees" within the meaning of the Act.[2]

In its answer, Respondent contends that a recent Ninth Circuit Court of Appeals decision, *Carnation Co.* v. *N.L.R.B.* F.2d (C.A. 9; April 30, 1970), in which the court denied enforcement of our order that, *inter alia,* invalidated certain individual agreements entered into between Carnation and its wholesale and retail dairy product deliverers because the deliverers were then represented by a union and covered by a valid collective-bargaining agreement, requires reversal of our unit determination herein. in *Carnation,* we found that because the deliverers were employees, not independent contractors, and entitled to representation by the union involved therein, Carnation could not lawfully negotiate separate contracts with them. The court disagreed with this finding and concluded that since the deliverers were independent contractors, Carnation did not violate the Act by dealing with them individually.

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[2] The only new evidence which Respondent offered to present to the Board involved the fact that several of the deliverers threatened to sue Respondent to enforce their individual contractor status. We are of the opinion that this factor, when weighed against the other factors which support a finding that the newspaper deliverers are not independent contractors, is not sufficient to warrant reversal of our prior unit determination.

In the underlying representation proceeding herein we found that the newspaper deliverers were employees, not independent contractors, within the meaning of the Act because, *inter alia,* the services rendered consisted of the routine manual work of loading and driving trucks over predetermined routes and dropping off bundles of newspapers in a prearranged order at designated drop spots; the drop spots are changed without prior consultation with the deliverers; the deliverers are closely supervised to insure proper and timely delivery of the newspaper; and the opportunity to realize any meaningful additional profit by cutting costs or changing methods of operation appears to be limited. The deliverers employed by Carnation, however, set their own hours of work and sequence of deliveries and, most importantly, can increase their profit by enlarging the difference between their costs, including the cost for Carnation dairy products, and the price they charge their wholesale or retail customers.

While we do not necessarily agree with the court's decision in *Carnation,* we find that it does not warrant reversal of our unit determination herein because Respondent clearly retains much greater control of the manner and means of accomplishing the result (newspaper delivery) than did Carnation, whose distributors were free to vary their methods of operation or raise the price in order to increase profitability.

All material issues having been either decided by the Board, admitted in the answer to the complaint, or established by the uncontested documents attached to the General Counsel's Motion for Summary Judgment, there are no factual issues requiring a hearing before a Trial Examiner. Accordingly, the General Counsel's Motion for Summary Judgment is granted and Respondent's Cross-Motion for Summary Judgment is denied. On the basis of the record before it, the Board makes the following:

Findings of Fact

I. The Business of Respondent

Respondent, The News-Journal Company, is engaged at Wilmington, Delaware, in the business of publishing and distributing newspapers in and around Wilmington, Delaware. During the past year, Respondent had a dollar volume of sales from its Wilmington facilities directly to customers outside the State of Delaware in excess of $50,000 and purchased materials from outside the State of Delaware valued in excess of $50,000.

Respondent admits, and we find, that Respondent is, and at all material times herein has been, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

Newspaper Guild of Greater Philadelphia, Local 10, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *The Representation Proceeding*

1. The Unit

At all times material herein, the following employees have constituted and now constitute a unit appropriate for purposes of collective bergaining within the meaning of the Act:

> All newspaper deliverers employed in the circulation department of the Employer's Wilmington, Delaware, newspaper business, excluding all other employees, and all supervisors as defined in the Act.

2. The Certification

On February 17, 1970, a majority of the employees in said unit, voting in a secret ballot election conducted under the supervision of the Regional Director for Region 4 of the

National Labor Relations Board, designated the Union as their representative for the purposes of collective bargaining with Respondent, and on February 26, 1970, the Regional Director for Region 4 certified the Union as the exclusive collective-bargaining representative of all the employees in said unit, and the Union continues to be such representative.

B. *The Request to Bargain and Respondent's Refusal*

On or about March 10, 1970, the Union requested and continues to request that Respondent bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about March 10, 1970, Respondent refused, and continues to refuse, to bargain collectively with the union as exclusive bargaining representative of the employees in said unit.

Accordingly, we find that the Union was duly certified as the collective-bargaining representative of the employees of Respondent in the appropriate unit described above; that the Union at all times since February 26, 1970, has been and now is the exclusive bargaining representative of all the employees in the aforesaid unit, within the meaning of Section 9(a) of the Act; and that Respondent has since March 10, 1970, refused to bargain collectively with the Union as the exclusive bargaining representative of its employees in the appropriate unit. By such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The acts of Respondent set forth in section III, above, occurring in connection with the operations as described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their elected bargaining agent for the period provided by law, we shall construe the initial year of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See: *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785; *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229, enfd. 328 F.2d 600 (C.A. 5), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421, enfd. 350 F.2d 57 (C.A. 10).

Conclusions of Law

1. Respondent is, and has been at all material times herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Newspaper Guild of Greater Philadelphia, Local 10, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All newspaper deliverers employed in the circulation department of Respondent's Wilmington, Delaware, newspaper business, excluding all other employees, and all supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since February 26, 1970, the above-named labor organization has been and now is the certified and exclusive

representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about March 10, 1970, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the aforesaid appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, its employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and has thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, The News-Journal Company, Wilmington, Delaware, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Newspaper Guild of Greater Philadelphia, Local 10, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All newspaper deliverers employed in the circulation department of its Wilmnigton, Delaware, newspaper

business, excluding all other employees, and all supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranted to them by Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Wilmington, Delaware, place of business, copies of the attached notice marked "Appendix".[3] Copies of said notice, on forms provided by the Regional Director for Region 4, shall, after being duly signed by Respondent's represntative, be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, ir conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notice is not altered, defaced, or covered by any other material.

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[3] In the event that this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted pursuant to a Judgment of the United States Court of Appeals enforcing an Order of the National Labor Relations Board."

(c) Notify said Regional Director for Region 4, in writing, within 10 days from the date of this Decision and Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D. C., Aug. 27, 1970.

.....
JOHN H. FANNING, *Member*

.....
FRANK W. MCCULLOCH, *Member*

.....
HOWARD JENKINS, JR., *Member*

NATIONAL LABOR RELATIONS BOARD

(SEAL)

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-504

THE NEWS-JOURNAL COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is not yet reported. The Board's decision in the unfair labor practice proceeding (Pet. App. 21a-31a) is reported at 185 NLRB No. 40, and its decision in the related representation proceeding (Pet. App. 8a-20a) is reported at 180 NLRB No. 137.

JURISDICTION

The judgment of the court of appeals (Pet. App. 7a) was entered on August 19, 1971. The petition for a writ

of certiorari was filed on October 8, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, on the facts of this case, the Board properly concluded that the company's newspaper delivery drivers are employees rather than independent contractors, and thus protected by the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are Section 2(3) (Pet. 3), and:

> Section 8(a) It shall be an unfair labor practice for an employer—
>
> * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT

Petitioner, the News-Journal Company, publishes two newspapers, the Morning News and Evening Journal, in Wilmington, Delaware. It has 21 delivery drivers who transport the papers to the Company's carrier boys and motor route drivers for ultimate delivery to the customer (Pet. App. 9a). On February 27, 1969, the Newspaper Guild of Greater Philadelphia, Local 10, AFL-CIO, filed a representation petition with the Board's

Regional Director seeking to represent the Company's delivery drivers (Pet. App. 8a-9a). At the hearing on the petition, the following evidence was adduced:

In the early 1960's the Company, dissatisfied with its distribution system, began to phase out the independent trucking companies which, under contract, were delivering the newspaper bundles from the plant to the carrier boys and motor route operators (Pet. App. 10a; A. 28-29).[1] At that time, the Company also automated its mail room, thus necessitating the layoff of a substantial number of mail room employees (Pet. App. 10a; S.A. 1). The Company offered individual contracts to a number of these mailers as well as to others to serve as the deliverers of the Company's newspapers (*ibid.*).

Under the contracts, the delivery drivers agree to supply their own trucks and deliver the papers from the Company plant to addresses the Company designates along routes in specified territories. In return, the Company agrees to make fixed weekly payments. The contract further provides that the deliverer shall transport and deliver the papers daily, regularly and promptly, and shall exercise due diligence to protect the papers from damage due to handling and the elements; that he shall deliver the papers at his own risk and expense, and according to his own methods of control; and that the contract shall continue in effect until terminated by either party, although it may be terminated without notice by the Company at any time upon

[1] "A." refers to the appendix, and "S.A." to the supplemental appendix, in the court of appeals.

breach by the driver of any of its provisions. The contract also recites that it contains the entire agreement between the parties and that its terms "shall not be changed, modified, altered or supplemented except in writing signed by [the] parties"[2] (Pet. App. 10a-11a; A. 103-106).

Each driver is required to be present at the loading dock from 15 to 45 minutes before the edition of a newspaper is due to come off the press. Mail room personnel count and bundle the papers when they leave the press room, affix a label to each bundle designating where it is to be delivered, and then send the bundle down the chute to the loading dock (Pet. App. 12a; A. 47-48, 77-78, 55-56). After the driver loads his truck, he delivers the papers to the prearranged locations, where the carrier boys and motor route operators pick them up. Once a driver delivers the papers his task is completed. He is not involved in the sale of the product to the carrier boys or motor route drivers (Pet. App. 12a; A. 35).

Delivery drivers are observed by the Company's district managers, who are also in charge of the carrier boys and the motor route operators. Although these contacts vary in frequency, District Manager Watts

[2] In fact, however, the contracts in most cases are not current and do not reflect the drivers' actual work requirements and compensation (see A. 106-134). For example, driver Alphonse Bolduc's contract provides for an income of $60 per week and delivery to a certain area, whereas he currently receives $180 per week and his territory consists of routes in a different area (A. 110-111; S.A. 6-9). Wallace Axselle's contract calls for $165 per week; currently he is receiving $180 per week (A. 106; A.S. 3-6). Rodney Cahall's contract calls for $185 per week; currently he is receiving $235 per week (A. 113).

stated that he sees one of his drivers as often as 3 or 4 times a week to make sure "that things are going okay" (A. 96-98). These officials check to see that the papers are not dropped in mud, water, or dirt, and that the deliveries are made on time (Pet. App. 1a; A. 81, 94-95). Where papers have been damaged due to exposure to the elements, District Manager Watts has told his drivers to drop the papers at other, more suitable, places (A. 94, 97). If the driver does not cooperate, Watts issues a special directive requiring him to "go to a certain place on bad weather days" (A. 97). Other infractions involving the manner in which the driver performs his functions, when called to the attention of the district manager, have resulted in discussions between the driver and the district manager, or in the latter reporting the driver to another Company official for reprimand (Pet. App. 12a; A. 94, 94, 98).

The Company often changes the routes the men drive. Such changes are initiated by the district managers and approved by their supervisors, and are relayed to the drivers via the mail room. (Pet. App. 12a-13a; A. 40-41.) For example, driver Raymond Mutter stated that 12 to 14 such changes had been made in his runs in 3 months (A. 79), and driver Rodney Cahall stated that his route had been changed approximately 3 to 4 times per month (A. 87). These changes may involve an increase in the route mileage, the number of papers or bundles handled, the number of drop locations, or the amount of time involved in servicing the area (Pet. App. 13a; A. 42-43, 79-80). The changes are instituted without seeking the approval of the driver, even though they may substantially modify the route as

originally drawn (A. 41-42, 96). No driver has ever refused to comply with the changes (A. 102).[3]

The Company also reorganizes routes, taking away portions of one driver's service area and thereby creating a new run for another driver (Pet. App. 11a-12a; A. 65-70). These changes are frequently made by the Company in the interest of providing better service to dealers (A. 67, 70, 107, 111, 121, 123). Occasionally, the revision is made at the request of a driver who finds an area too difficult to handle for personal reasons (Pet. App. 12a; A. 6; 71, 73, 88). While these reorganizations often involve an increase in route mileage, number of papers handled, number of drop locations, and route service time, they do not necessarily result in additional compensation for the driver (Pet. App. 13a; A. 79). For example, one deliverer was assigned an additional 800 papers on one occasion, and was required to service 3 additional drop points and cover 5 additional miles on another occasion. He received no increase in compensation for either of these changes (A. 79-81).

In addition, the Company has unilaterally made other kinds of changes in the work routine of the drivers. Thus, the Company maintains "honor boxes" at various locations, where papers are sold to the public on an honor-system basis. These boxes were originally serviced by certain drivers who purchased the papers wholesale and resold them at the honor boxes along

[3] On one occasion, driver Mutter became disgruntled at a large increase ordered in the number of papers he was to haul and asked the assistant circulation director to reconsider the change (A. 79-80). He was told that "if [he] didn't like [his] route [he] could give it up" (A. 41, 80).

their route. The Company, on its own, terminated this policy and assigned all of the honor boxes to a single driver (A. 32-33, 86; S.A. 2.) Moreover, although their contracts do not call for the delivery of honor boxes, stakes, and tubes (receptacles for home delivery), a driver will often find these items waiting for him at the loading dock with instructions that they be delivered to a certain location. The driver does not receive extra compensation for this task (A. 89).

Based on these facts, the Board concluded that the deliverers are not independent contractors, but employees of the Company within the meaning of the National Labor Relations Act (Pet. App. 18a). In support of its conclusion, the Board noted that (Pet. App. 17a-18a):

> The services rendered almost exclusively consist of the routine manual work of loading and driving trucks over agreed-upon routes and dropping off bundles of newspapers properly and in a prearranged sequence or order at designated drop spots. The possibility of realizing any meaningful added profit by changing the established method of operation appears to be very limited. * * * The deliverers retain practically no independence in their operations; they cannot decide when or whether they will go out on an assigned route; they cannot fix the time of delivery; and they cannot determine that others should drive their vehicles, except in cases of illness, vacation, or excusable absence, when they provide and pay for their own substitutes. * * *

> * * * The territories and drop spots are predetermined by the distribution and district managers. All that remains to be done is the physical work of loading, truck driving, and dropping off the paper bundles. There is no room for the exercise of true discretion in the performance of the work. The drop spots are changed, without consultation, by written orders of the district manager which are relayed to the deliverers by the mailroom at pickup time. The deliverers may not receive added compensation for some of these changes. The district managers tell the deliverers how to properly drop off their bundles and rely on the distribution manager for further corrective and disciplinary measures. There is necessarily close supervision of the deliverers to insure proper timely delivery of the paper to the ultimate subscriber.

The Board directed that an election be held among the delivers. The Union won the election and was certified as their bargaining representative (Pet. App. 19a, 23a). Thereafter, the Company refused to bargain with the Union, and in the ensuing unfair labor practice proceeding the Board found the Company to be in violation of Section 8(a)(5) of the Act and ordered it, *inter alia,* to bargain with the Union upon request (Pet. App. 28a-30a).

The court of appeals sustained the Board's findings and enforced its order (Pet App. 1a-6a).

ARGUMENT

In *National Labor Relations Board* v. *United Insurance Co.,* 390 U.S. 254, 256, this Court held that, in

distinguishing between employees and independent contractors for purposes of the Act,[4] "general agency principles" are to employed and "all of the incidents of the [employment] relationship must be assessed and weighed with no one factor being decisive" (390 U.S. at 258). As shown above, the Board, upheld by the court below (Pet. App. 5a), considered the total employment relationship in concluding that the drivers were employees.[5] Thus, petitioner's contention that the Board erred merely raises a factual issue which does not warrant further review.

The cases relied on by petitioner (Pet. 13-15) as establishing a conflict among the circuits are distinguishable. In *Frito-Lay, Inc.* v. *National Labor Relations Board,* 385 F. 2d 180, 186 (C.A. 7), and *Carnation Co.* v. *National Labor Relations Board,* 429 F.2d 1130, 1132 (C.A. 9), the drivers set the retail price for the products they delivered and their profits depended on the difference between that price and the wholesale price at which they purchased the product. The drivers here did not enjoy that opportunity to increase their income. In *National Labor Relations Board* v. *Abell Co.,* 327 F. 2d 1, 7 (C.A. 4), unlike here, the court found that the delivery drivers operated "largely uninhibited by publisher control."

---

[4] Section 2(3) of the National Labor Relations Act provides that the term "employee" shall not include "any individual having the status of an independent contractor."

[5] Petitioner's contention (Pet. 12) that the Board and the court below primarily relied upon the low profit potential for and the limited skill needed by the truck-driver delivery men misconstrues the decisions, which show that all elements of the relationship were taken into account. See Pet. App. 5a.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.

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NORTON J. COME,
Assistant General Counsel,

LINDA SHER,
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National Labor Relations Board.
NOVEMBER 1971.

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IN THE

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THE NEWS-JOURNAL COMPANY, *Petitioner*

v.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Under November 11, 1971 date, the Solicitor General of the United States filed his brief for the National Labor Relations Board in opposition to the Petition. A thorough review of the brief finds little to comment upon with one exception. The Solicitor General devotes a substantial part of this short paper to endeavoring

to establish that a unionized employee, a member of the same union seeking representation here, had the authority to direct the activities of the questioned employees, namely, the route truck drivers. These references appear at pages 4, 5, 6 and 7 of the Solicitor General's ten page brief.

We respectfully call the court's attention to the cross-examination of District Manager Watts, whose direct testimony is so heavily relied upon by the Solicitor General:

> "Q. As a matter of fact, you know that you as a district manager can't give him any orders, do you not? A. This is true. I can't.
>
> Q. And if you have a complaint with him, if he isn't willing to accept it man to man, as you stated, you would recommend that he not drop them in the mud, and I sure agree with you that he shouldn't drop them in the mud. But your only recourse is to go on up through your supervisor and through the circulation manager, isn't it? A. Yes, sir, or contact the distribution manager, Mr. Allen." (J.A. 98)
>
> "Q. And so far as you're concerned, your sole relationship to the drop spot change is that you initiate it and send it up the line of command, in a sense, that you're working with, and it's up to somebody else to see that the trucker gets that, and that it's carried out? A. Yes, sir, that's true.
>
> * * * * * * * * *
>
> [499] Q. (By Mr. Hanson) What would be your recourse if the trucker didn't carry out the requested change for a drop spot change? A. Well I would promptly call the mail room and ask him if I got the drop spot change and if the plate had been changed—because it could have gotten lost from the supervisor—
>
> Q. This has happened, that they— A. It probably has; I don't recall if it happened to me, but it probably has happened.

Q. So if you called the mail room and found that it got there and he hadn't carried it out, what would you do then?

* * * * * * * * *

[500] The Witness: If the label did get changed and the driver did not make the drop spot change as the label read, I would see the driver and ask him why he didn't change it—if he didn't notice it or what. And if he was not cooperative, I would report him.

Q. (By Mr. Hanson) You'd report him to your supervisor? A. To my supervisor.

Q. Then it's up to them to do something further up the line, isn't it? A. Yes, sir.

Q. And in the case of Mr. Morris, when you had some reports on him, he finally was terminated by the circulation manager, wasn't he? A. Yes, sir.

Q. His contract was terminated, wasn't it? A. That's right." (J.A. 100-01)

Further, we respectfully call to the court's attention this colloquy appearing at page 487 of the Transcript:

Hearing Officer: I agree that the determination will ultimately be made by the Regional Director. However, based on the man's position and his experience, I will permit the opinion.

The Witness: To answer your question, I know that the News Journal Company, my employer, has considered them as independent contractors, but I don't know what the men have considered themselves.

Q. (By Mr. Hanson) I didn't ask you that. I asked you what you consider them to be? A. And as a member of the employee staff I considered them as independent contractors.

We respectfully submit that, in light of this uncontroverted testimony on cross examination, the So-

licitor General's reliance upon the direct testimony is of no probative value whatsoever and should be disregarded.

Respectfully submitted,

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